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CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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COPY

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

BYD COMPANY LIMITED, a People's  
Republic of China corporation

Plaintiff,

v.

AA PORTABLE POWER CORPORATION, a  
California corporation; POWERIZER; KEVIN  
LEE, an individual; and XIAOPING JIANG, an  
individual,

Defendants.

CASE NO. C 03-1035 EMC

**NOTICE OF *EX PARTE* MOTION AND  
*EX PARTE* MOTION FOR  
TEMPORARY RESTRAINING  
ORDER, ORDER TO SHOW CAUSE,  
AND ORDER AUTHORIZING  
EXPEDITED DISCOVERY AND  
DIRECTING ENTRY OF  
PROTECTIVE ORDER REGARDING  
CONFIDENTIAL INFORMATION**

TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE THAT pursuant to Civil Local Rules 7-10 and 65-1 and Federal Rule of Civil Procedure 65, plaintiff BYD Company Limited ("BYD China") hereby moves for a Temporary Restraining Order preventing defendants AA Portable Power Corporation ("AA Portable"), Powerizer ("Powerizer"), Kevin Lee, and Xiaoping Jiang (collectively "Defendants") from making, selling, offering for sale, or distributing counterfeit or otherwise unlawful copies of BYD China's batteries in violation of its rights, from infringing BYD China's BYD trademark, and from further engaging in unfair competition, and ordering all Defendants to preserve

documents and things relevant to this litigation. BYD China also moves pursuant to Civil Local Rule 16-2 and Federal Rules of Civil Procedure 26, 30, 31, and 34 for an Order excluding this case from certain case management requirements of Fed. R. Civ. Proc. 26(d); granting BYD China immediate leave to serve its First Set of Requests for Production of Documents and Inspection on AA Portable and its First Set of Requests for Production of Documents and Inspection on Powerizer (such requests are attached to BYD China's [Proposed] Temporary Restraining Order, Order to Show Cause and Order Authorizing Expedited Discovery and Directing Entry of Protective Order filed herewith as Exhibits A and B, respectively); requiring Defendants to serve written responses to BYD China's First Set of Document Requests. produce responsive documents and permit inspection of facilities within seven (7) calendar days of BYD China's service of the discovery requests; and granting BYD China immediate leave to take the deposition by oral examination of Defendants on issues relating to BYD China's Motion for Temporary Restraining Order and Order to Show Cause at any time upon three (3) business days notice. This Motion is based upon the grounds that Defendants have engaged and continue to engage in infringement of BYD China's federally registered BYD trademark, and have and continue to engage in unfair competition; that BYD China is being irreparably harmed by such infringements and misrepresentations; and that BYD China needs prompt discovery to determine the full extent of Defendants' unlawful conduct, to prevent Defendants from destroying or concealing evidence of their unlawful conduct, and to enable BYD China to develop a full factual record in support of its request for a preliminary injunction.

Pursuant to Fed. R. Civ. Proc. 26(c)(7), BYD China further moves for an Order entering the [Proposed] Protective Order Regarding Confidential Information, attached to [Proposed] Temporary Restraining Order, Order to Show Cause and Order Authorizing Expedited Discovery and Directing Entry of Protective Order filed herewith as Exhibit C. This motion is made on the grounds that such an order is appropriate and necessary to preserve the secrecy of confidential business information that may be produced during this litigation and to facilitate discovery.

1 Plaintiff's Motion is based upon BYD China's Complaint filed with this Court on March  
2 11, 2003 (attached hereto as Exhibit A), this Notice of Motion and Motion, the Memorandum of  
3 Points and Authorities filed in support of this Motion, the supporting Declarations of Lung-Chi  
4 Lee, Huang Zhang Hui, Wei Qun E, and Zuoquan Xia, the [Proposed] Temporary Restraining  
5 Order, Order to Show Cause and Order Authorizing Expedited Discovery and Directing Entry of  
6 Protective Order Regarding Confidential Information, and the materials on file in this action.

7 DATED: March 13, 2003

PERKINS COIE LLP

8 By: Kenneth B. Wilson  
9 Kenneth B. Wilson

10 Attorneys for Plaintiff  
11 BYD Company Limited  
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**EXHIBIT A**

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

BYD COMPANY LIMITED, a People's  
Republic of China corporation

Plaintiff,

v.

AA PORTABLE POWER CORPORATION, a  
California corporation; POWERIZER; KEVIN  
LEE, an individual; and XIAOPING JIANG, an  
individual

Defendants.

**C 03 - 1035**

COMPLAINT FOR TRADEMARK  
INFRINGEMENT, UNFAIR  
COMPETITION, AND FALSE  
ADVERTISING

DEMAND FOR JURY TRIAL

EMC

Plaintiff BYD Company Limited ("Plaintiff" or "BYD") hereby alleges for its Complaint against Defendants AA Portable Power Corporation ("AA Portable"), BYD Battery (USA) Corporation ("BYD USA"), Powerizer d/b/a Batteryspace.com ("Powerizer"), Kevin Lee ("Lee") and Xiaoping Jiang ("Jiang") (collectively "Defendants") on personal knowledge as to their own acts and on information and belief as to the actions of others, as follows:

**The Parties**

1. Plaintiff BYD is a corporation incorporated in the People's Republic of China with its principal place of business in Shenzhen, China. BYD is one of the world's leading providers of rechargeable batteries.

1           2. Defendant AA Portable is a California corporation with its principal place of  
2 business in Richmond, California. AA Portable is in the business of marketing and selling certain  
3 rechargeable batteries in competition with BYD and its authorized distributors.

4           3. Defendant Powerizer is a business organization of unknown form with its principal  
5 place of business in Richmond, California. Powerizer is in the business of marketing and selling  
6 certain rechargeable batteries in competition with BYD and its authorized distributors.

7           4. Defendant Kevin Lee is an individual residing in El Cerrito, California. Lee is the  
8 general manager of Powerizer and is also affiliated with AA Portable.

9           5. Defendant Xiaoping Jiang is an individual residing in El Cerrito, California. Jiang  
10 is the President of AA Portable and is also affiliated with Powerizer.

#### 11                           **Jurisdiction and Venue Allegations**

12           6. This Court has jurisdiction over the subject matter of this action pursuant to 28  
13 U.S.C. §1331 and 1338(a), as this action arises under the trademark laws of the United States.

14           7. Venue is proper in this Court pursuant to 28 U.S.C. §1391, as this is a judicial  
15 district in which a substantial part of the events giving rise to the claims occurred.

#### 16                           **Intra District Assignment**

17           8. This action is properly filed in the San Francisco Division of the U.S. District Court  
18 for the Northern District of California pursuant to Civil Local Rule 3-2(c) because a substantial  
19 part of the events giving rise to the claims set forth in this Complaint occurred in Alameda County.

#### 20                           **FIRST CAUSE OF ACTION**

21                           (Trademark Infringement, 15 U.S.C. §§1114 and 1125(a))

22           9. BYD repeats and re-alleges the allegations of paragraphs 1 through 8 of the  
23 Complaint as if fully set forth herein.

24           10. BYD is the sole owner of a federal trademark registration for the trademark "BYD",  
25 United States Trademark Serial Number 75943230, which BYD has been using in commerce to  
26 describe its business and battery products exclusively and continuously since at least 1995.

1 Because of its long and continuous use of the marks, BYD owns an incontestable U.S. trademark  
2 for BYD.

3 11. As a result of its use and promotion of the name BYD, BYD has built up and now  
4 owns valuable goodwill that is symbolized by its trademark.

5 12. Defendants have used and continue to use the BYD trademark without  
6 authorization to identify batteries that were not made or distributed by BYD. Defendants have also  
7 used and continue to use the BYD trademark without authorization to enhance their business by  
8 deceiving the consuming public into believing that Defendants have some affiliation with BYD.

9 13. Defendants' unauthorized uses in commerce of the BYD trademark, and  
10 Defendants' other acts alleged herein, are likely to cause confusion, to cause mistake, or to  
11 deceive, as to the origin, sponsorship or approval of such products and as to the affiliation,  
12 connection or association with Defendants and such products with BYD, and constitute trademark  
13 infringement in violation of Section 32 of the Lanham Act, 15 U.S.C. §1114(1), and Section 43(a)  
14 of the Lanham Act, §1125(a).

15 14. Defendants' acts of trademark infringement have caused and will continue to cause  
16 irreparable damage to BYD's business and reputation. It would be difficult to ascertain the  
17 amount of compensation which could afford BYD adequate relief for such continuing acts. BYD's  
18 remedy at law is not adequate to compensate for the injuries suffered and/or threatened.  
19 Accordingly, BYD is entitled to injunctive relief and for an order of seizure pursuant 15 U.S.C.  
20 §1116, as set forth below.

21 15. By reason of Defendants' acts, BYD has suffered and will continue to suffer  
22 damage to its business, reputation and goodwill, and the loss of sales and profits it would have  
23 made but for Defendants' acts, in an amount to be proven at trial. In addition, Defendants' past  
24 and continuing infringement of the BYD trademark has been and continues to be deliberate and  
25 willful, and was calculated to harm the goodwill of the marks and BYD's reputation and goodwill.  
26 As a consequence of Defendants' willful misconduct, BYD is entitled to an award against  
27  
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1 Defendants in an amount of three times BYD's damages, three times Defendants' profits, and to  
2 BYD's attorneys' fees and costs incurred in connection with this action.

3 **SECOND CAUSE OF ACTION**

4 (Unfair Competition & False Advertising, 15 U.S.C. §1125(a))

5 16. BYD repeats and re-alleges the allegations of paragraphs 1 through 15 of the  
6 Complaint as if fully set forth herein.

7 17. Defendants' use of the BYD trademark in connection with their own products in  
8 commercial advertising or promotion, misrepresents the nature, characteristics, qualities, and/or  
9 geographic origin of Defendants' own batteries. Defendants have also engaged in false advertising  
10 by referring to themselves as the manufacturers of the batteries that they have distributed or  
11 continue to distribute.

12 18. By making these statements in connection with the sale of competing goods in  
13 commerce, Defendants have engaged and continue to engage in unfair competition and false  
14 advertising in violation of 15 U.S.C. §1125(a).

15 19. Defendants' acts of trademark infringement and false advertising have caused and  
16 will continue to cause irreparable damage to BYD's business and reputation. It would be difficult  
17 to ascertain the amount of compensation which could afford BYD adequate relief for such  
18 continuing acts. BYD's remedy at law is not adequate to compensate for the injuries suffered  
19 and/or threatened. Moreover, there would be a continuing likelihood that the public would be  
20 deceived by Defendants' false and misleading statements. Accordingly, BYD is entitled to  
21 injunctive relief and for an order of seizure pursuant 15 U.S.C. §1116, as set forth below.

22 20. By reason of Defendants' acts, BYD has suffered and will continue to suffer  
23 damage to its business, reputation and goodwill, and the loss of sales and profits it would have  
24 made but for Defendants' acts, in an amount to be proven at trial. In addition, Defendants' past  
25 and continuing infringement of the BYD trademark has been and continues to be deliberate and  
26 willful, and was calculated to harm the goodwill of the marks and BYD's reputation and goodwill.  
27 As a consequence of Defendants' willful misconduct, BYD is entitled to an award against  
28

1 Defendants in an amount of three times BYD's damages, three times Defendants' profits, and to  
2 BYD's attorneys' fees and costs incurred in connection with this action.

3 **THIRD CAUSE OF ACTION**

4 (Unfair Competition and False Advertising, Cal. Bus. & Prof. Code §§17200 et seq. & 17500 et seq.)

5 21. BYD repeats and re-alleges the allegations of paragraphs 1 through 20 of the  
6 Complaint as if fully set forth herein.

7 22. By the acts described above, Defendants have engaged in unlawful and unfair  
8 business practices and have conducted unfair, deceptive and misleading acts which have injured  
9 and threaten to continue to injure BYD's business, goodwill and property, unless restrained.  
10 Accordingly, BYD is entitled to injunctive relief and for an order of seizure pursuant 15 U.S.C.  
11 §1116, as set forth below.

12 23. Defendants have been and will continue to be unjustly enriched by virtue of the  
13 sales and profits they have made through their false and misleading representations. Accordingly  
14 BYD is entitled to restitution and other relief under Cal. Bus. & Prof. Code §§17200 et seq. and  
15 17500 et seq., as set forth below.

16 **Prayer for Relief**

17 WHEREFORE, BYD requests that the Court enter judgment in its favor and against  
18 Defendants on its Complaint as follows:

19 A. Granting an injunction temporarily, preliminarily and permanently enjoining and  
20 restraining Defendants and their officers, agents, servants, employees, affiliates, parent or  
21 subsidiary corporations, attorneys, and all those in privity or acting in concert with Defendants,  
22 from using the BYD name in any form or any close variation thereof;

23 B. Ordering an accounting by Defendants of all gains, profits and advantages derived  
24 from their unlawful activities, such amount to be trebled pursuant to 15 U.S.C. §1117(a) by virtue  
25 of Defendants' willful conduct;

1 C. Issuing an order of seizure pursuant to 15 U.S.C. §1116(d)(2) for the seizure of  
2 goods and counterfeit marks, means of making such marks, and records documenting the  
3 manufacture, sale, or receipt of things involved in Defendants' trademark infringement;

4 D. Awarding compensatory damages in an amount to be proven at trial, such amount  
5 to be trebled pursuant to 15 U.S.C. §1117(a) by virtue of Defendants' willful misconduct;

6 E. Awarding BYD's costs incurred in this action, together with reasonable attorneys'  
7 fees; and

8 F. Granting such other and further relief as this Court may deem just and proper.

9  
10 DATED: March 11, 2003

PERKINS COIE LLP

11 By: Kenneth B. Wilson *by: J. Lee*  
12 Kenneth B. Wilson

13 Attorneys for Plaintiff  
14 BYD Company Limited  
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**DEMAND FOR JURY TRIAL**

Plaintiff BYD Company Limited hereby demands a trial by jury of this action.

DATED: March 11, 2003

**PERKINS COIE LLP**

By Kenneth B. Wilson by J. J. J. J.  
Kenneth B. Wilson

Attorneys for Plaintiff  
BYD Company Limited